

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL
75-7661

United States Court of Appeals
FOR THE SECOND CIRCUIT

B
P/S

THOMAS I. FITZGERALD, Public Administrator of the
County of New York, State of New York, as personal
representative of the estate of JACINTO VINCENTE
MEJIA RENTERIA, deceased,

Plaintiff-Appellant,

—against—

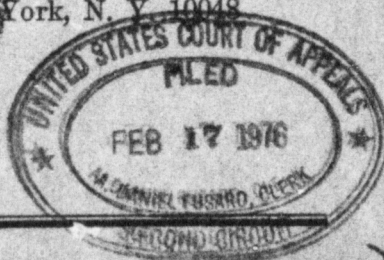
ZIM ISRAEL NAVIGATION CO., ZIM ISRAELI NAVI-
GATION CO., ZIM ISRAEL NAVIGATION CO. LTD.,
ZIM LINES AND AMERICAN-ISRAEL SHIPPING
CO., INC.,

Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

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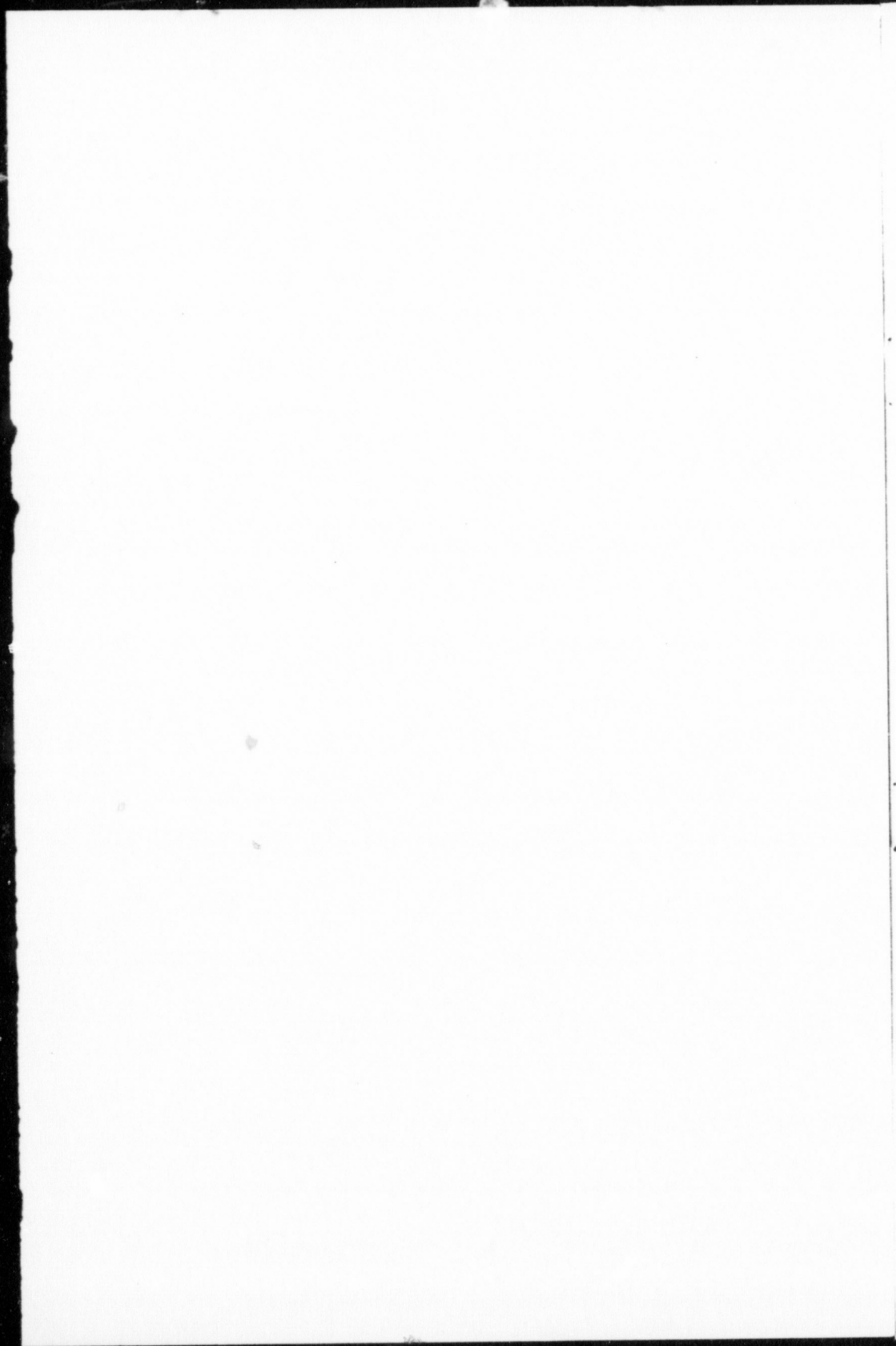


TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
POINT I—The District Court did not abuse its discretion in dismissing any foreign law claim which plaintiff may have had against Zim Israel as forum non conveniens	3
POINT II—On the facts of this case there is no jurisdiction to apply the Jones Act	5
POINT III—There is no triable issue of fact as to whether ZAISCO owned and operated MV DAHLIA or employed the decedent	7
POINT IV—There is no subject matter jurisdiction to apply the Death on the High Seas Act (DOHSA)	8
CONCLUSION	9
ADDENDUM	154a

Cases Cited

Bartholomew v. Universe Tankships, Inc., 263 F.2d 437 (2 Cir. 1959), cert. den. 359 U.S. 1000 (1959)....	6, 7
Fitzgerald v. Texaco Inc., 521 F.2d 448 (2 Cir. 1975)....	4, 5, 8
Fitzgerald v. Westland Marine Corp., 369 F.2d 499 (2 Cir. 1966).....	5
Lakos v. Soliaris, 116 F.2d 440 (4 Cir. 1940).....	8
Lauritzen v. Larsen, 345 U.S. 571 (1953).....	6
Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).....	8

Xerakis v. Greek Lines, 382 F.Supp. 774 (E.D. Pa. 1974)	4
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Statutes Cited

46 USCA (Death on the High Seas Act):	
Secs. 761-768	1, 8
46 USCA (Jones Act):	
Sec. 688	1, 5-8

Rule Cited

F.R.C.P.:	
56	7

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THOMAS I. FITZGERALD, Public Administrator of the
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representative of the estate of JACINTO VINCENTE
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BRIEF FOR DEFENDANTS-APPELLEES

Statement of the Case

Plaintiff, the Public Administrator of the County of New York, brought this action before the District Court as personal representative of the estate of an alien seaman ("decedent") alleging that decedent died possessed of a cause of action in New York against his employer under the Jones Act (46 USCA § 688); Death on the High Seas Act (46 USCA §§ 761-768) and General Maritime law of the United States. The principal jurisdictional allegation is that decedent's employer and its vessel

MV DAHLIA were controlled by American financial interests. Of the five named defendants only two exist: Zim Israel Navigation Co., Ltd. (Zim Israel) and Zim American Shipping Co. Inc. (ZAISCO). Both Zim Israel and ZAISCO are alleged to have severally employed decedent, owned and operated MV DAHLIA and to have been controlled, in turn, by American financial interests. Upon motions the cause of action against ZAISCO was dismissed as without merit and the cause of action against Zim Israel under United States law was dismissed for lack of subject matter jurisdiction. Any remaining foreign law cause of action against Zim Israel was dismissed for forum non conveniens, provided that Zim Israel submit to the jurisdiction of the courts in Ecuador or Israel and waive any defense of statute of limitations which it might have there. Plaintiff appeals.

Statement of Facts

The following facts were submitted unrebutted to the District Court.

The decedent was a citizen and resident of Ecuador as are his survivors and next of kin (56a).

The decedent was employed by Zim Israel as a seaman (35a) pursuant to a contract executed between them in Ecuador (39a-40a; 56a). The contract provided that their relationship would be governed by the law of Israel (40a).

Pursuant to contract decedent boarded the vessel MV DAHLIA in Panama and worked aboard that vessel until the time of his injury and death (56a). Decedent was injured aboard MV DAHLIA 500 miles east of Japan and died in international waters on April 23, 1968 (56a). Neither MV DAHLIA nor decedent entered United States waters while Zim Israel employed him aboard said vessel (56a).

MV DAHLIA is an Israeli vessel flying the flag of the Republic of Israel (37a-38a; 56a). At all times Zim Israel has been the sole owner, operator, manager, controller and supplier of MV DAHLIA (35a; 56a).

Zim Israel is a corporation organized in British Palestine (57a) and existing under the law of the State of Israel (35a, 56a). At all times its base of operations and principal place of business has been in Haifa, Israel (35a; 57a). At all relevant times the officers have been citizens of Israel (57a). At all times Zim Israel has been owned, operated, managed and controlled by Israeli interests (57a). At the time of decedent's death 80% of its stock was held by the government of Israel (57a).

ZAISCO is a New York corporation having its principal place of business in New York City (35a). At all times it has been the disclosed agent and representative in the United States of Zim Israel (35a). As agent the scope of its authority is limited to general administrative matters, cargo bookings and passenger bookings (36a). ZAISCO never owned, chartered, operated, managed, controlled or supplied MV DAHLIA (36a). ZAISCO never employed the decedent. ZAISCO had no employees or representatives working aboard MV DAHLIA at the time of decedent's injury or death (36a).

This action is one between aliens.

POINT I

The District Court did not abuse its discretion in dismissing any foreign law claim which plaintiff may have had against Zim Israel as forum non conveniens.

Plaintiff's brief resurrects many legal issues disposed of before the district court. In the interest of brevity, defendant's brief is directed only to those more salient issues.

Plaintiff's Point I can be broken down as follows:

- 1) there is no remedy for the plaintiff under Israeli law;
- 2) foreign law may be less liberal than United States law; and
- 3) it is inequitable to dismiss foreign law claims against Zim Israel as forum non conveniens after the case has been in this forum for four years.

First, plaintiff cannot assert there is no remedy under Israeli law because plaintiff has adduced no evidence as to the law of Israel. Plaintiff's exhibits (87a-89a) relate to insurance and have no bearing on plaintiff's right to maintain a death action before an Israeli court.

Second, the liberality of foreign law as compared with United States law is not relevant because: 1) there being no subject matter jurisdiction to apply United States law this action must be determined under foreign law regardless of its liberality (115a, 117a); and 2) the liberality of foreign law is not consideration in deciding the issue of forum non conveniens. *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 453 (2 Cir. 1975), *Xerakis v. Greek Lines*, 382 F. Supp. 774, 777 (E.D. Pa. 1974).

Finally, the claim that Zim Israel delayed its motion to dismiss for forum non conveniens for 3 years and 9 months or until the eve of trial is misleading. The defense of forum non conveniens appears in Zim Israel's Answer to the Complaint (23a, 24a) and as a contention in the Pre-Trial Order (139a). The explanation for Zim Israel's inability to obtain a prompt dismissal of the action is contained in the District Court's opinion dated May 16, 1975 (117a-119a):

"Any delay in the making of this motion is chargeable wholly to plaintiff's wide ranging efforts to

prove American ownership and control of the MV DAHLIA. Having failed to so demonstrate, plaintiff cannot now use this lengthy discovery period to bootstrap himself into an equitable argument for maintenance of the action in this forum based on lapse of time." (118a-119a)

The District Court did not abuse its discretion in dismissing foreign law causes of action against Zim Israel as forum non conveniens and its decision should not be disturbed. *Fitzgerald v. Westland Marine Corp.*, 369 F2d 499, 502 (2 Cir. 1966); *Fitzgerald v. Texaco Inc.*, 521 F2d 448, 451 (2 Cir. 1975).

POINT II

On the facts of this case there is no jurisdiction to apply the Jones Act.

Plaintiff alleges that there are substantial contacts between this case and the United States which warrant the application of the Jones Act. The contacts plaintiff deems substantial are listed in his brief (pp. 16-17). A review of these contacts shows: 1) contacts lettered "a" and "n" are unsupported allegations; 2) contact "m" is neither true nor relevant; 3) contacts lettered "b" through "i" do not relate to Zim Israel which was the decedent's employer and owner of MV DAHLIA and are therefore not relevant Jones Act contacts, and; 4) contacts "j" through "l" are merely "fortuitous circumstances" insufficient to predicate jurisdiction upon (110a).

Plaintiff's contact "n", developed further in his brief in pps. 20-23, alleges that the real allegiance of Zim Israel is not to the State of Israel but to the United States. The sole basis for this allegation is that Zim Israel is invested

in by the Israel corporation which is in turn invested in by American financial interests. Plaintiff has not denied that Zim Israel was 80% owned by the government of Israel at the time of decedent's injury and death (112a). Plaintiff's research reveals that the Israel corporation was not in existence at the time of decedent's injury and death. The evidence before the District Court shows that at present Zim Israel is 50% owned by the Israel corporation and that the equity of American shareholders in the Israel corporation is 15% (112a; 154a defendants' brief). There is no rationale for believing that Zim Israel was at any time owned and controlled by American financial interests.

Plaintiff's brief (pp. 17 and 25) alleges that defendants are "doing business" in the United States. This is true. ZAISCO is a New York corporation. Zim Israel's vessels do call at United States ports in transoceanic trade. There is a distinction however between that which would warrant service of process and that which is necessary to bring extraterritorial torts between aliens to judgment under our law. The fact that a shipowner is "doing business" in the United States by calling at our ports is not a contact which may subject him to the jurisdiction of the Jones Act. *Lauritzen v. Larsen*, 345 U.S. 571, 590 (1953).

Those contacts which the court next consider in determining whether it may exercise its jurisdiction under the Jones Act were set forth in *Lauritzen*, *supra*, under which we find that (1) the place of the wrong was the high seas; (2) the law of the flag was Israeli; (3) the domicile of the injured party was Ecuador; (4) the allegiance of the shipowner is Israel; (5) the place where the contract was made was Ecuador; and (6) the base of operations of the shipowner is Israel, (108a-109a). Under the *Lauritzen* test contacts with the United States are nonexistent. As the Court said in *Bartholomew v. Universe Tankships*,

Inc., 263 F. 2d 437 (2 Cir., 1959), cert. den. 359 U.S. 1000 (1959): "The facts either warrant the application of the Jones Act or they do not" (263 F.2d at 443). In this case they do not.

POINT III

There is no triable issue of fact as to whether ZAISCO owned and operated MV DAHLIA or employed the decedent.

That ZAISCO is a disclosed husbanding agent for Zim Israel has been well established through litigation before our courts (33a). In this litigation ZAISCO has denied that it owned and operated MV DAHLIA or employed the decedent. On those issues ZAISCO submitted the following evidence in its motion for summary judgment: 1) the affidavit of Egon Gruenhut, executive vice president of ZAISCO and attorney in fact for Zim Israel; 2) a copy of the relevant pages of Lloyd's Register of Shipping; and 3) a copy of the employment contract between Zim Israel and the decedent. The evidence therein conclusively established that ZAISCO did not own and operate MV DAHLIA or employ the decedent (31a-41a).

In opposition plaintiff's attorney offered only his own statement denying the validity of ZAISCO's evidence (48a-52a). The cause of action against ZAISCO was properly dismissed pursuant to Rule 56 F.R.C.P. as being without merit and without a triable issue of fact.

POINT IV

There is no subject matter jurisdiction to apply the Death on the High Seas Act (DOHSA).

Plaintiff contends that where jurisdiction is expressly given by statute to a United States court by Congress, the court must hear the case and cannot decline jurisdiction. This begs the question. The issue is whether such jurisdiction has been given in the present case. Plaintiff argues for jurisdiction on the basis that DOHSA, in effect, is a statute of cosmic application while conceding that DOHSA's sister statute, the Jones Act, is limited in its jurisdiction to cases having substantial United States contacts. This argument is contrary to law. The jurisdiction of DOHSA in this case is coextensive with the Jones Act. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382 (1959); *Fitzgerald v. Texaco*, 521 F.2d at 454. Since there is no subject matter jurisdiction for the Jones Act there is none for DOHSA. If there is no subject matter jurisdiction for DOHSA there is no jurisdiction for an amendment thereunder. This claim cannot be heard under DOHSA or an amendment thereunder for, as plaintiff's brief states (p. 34) quoting from *Lakos v. Soliaris*, 116 F.2d 440, 444 (4 Cir. 1940): "[the courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." (citation omitted) (parenthesis supplied).

CONCLUSION

The judgment appealed from should be affirmed
with costs.

Respectfully submitted,

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[ADDENDUM FOLLOWS]

ADDENDUM

KRUGER—BY PLAINTIFF—DIRECT

(21)* own any of the three classes of stock in the Israel Corporation?

A. How many Americans?

Q. Yes.

A. No, sir.

Q. Can you estimate for me, percentagewise, how many Americans own stock, percentagewise referring to the amount of stock?

A. The amount of stock outstanding?

Q. Yes.

A. At best, sir, it would be a guess, but I would think that Americans don't own more than 15% of the equity of the company.

Q. Do you remember when I talked to you over the telephone with reference to the service of the subpoena?

A. Yes, I do.

Q. You were at your home in Ridgewood, New Jersey, and I called because I was under the impression, at that time, the subpoena had not been served.

A. I do, indeed.

Q. Do you remember telling me at that time that Americans owned a substantial amount of stock in the Israel Corporation?

A. I don't remember it, sir, but I could not have said it.

* (Figures in parentheses refer to page numbers of Transcript).

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FITZGERALD

VS

ZIM ISREAL ET AL

AFFIDAVIT
OF SERVICE

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss:

AFRIM HASKAJ

being duly sworn,

deposes and says that he is over the age of 21 years and resides at 1481 42nd street Bklyn

That on the 17th day of february, 1976, ~~XXXX~~
he served the annexed brief for defendants-appellees uponThomas M. Breen, attorney for the plaintiff-appellant, 160 Broadway, NY, NY
in this action, by delivering to and leaving with said attorneys

two

x ~~three~~ true copies to each thereof.


DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 17th

day of february, 1976, ~~XXXX~~

} Afrim Haskaj


 ROLAND W. JOHNSON
 Notary Public, State of New York
 No. 4509705
 Qualified in Delaware County
 Commission Expires March 30, 1977